

Risk Management and Your CASA Program

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Sources

- Energize, Inc...Especially for Leaders of Volunteers
 - <http://www.energizeinc.com/art.html>
 - <http://www.energizeinc.com/art/subj/risk.html>
- Georgia Center for Nonprofits
 - www.gcn.org
- National and Georgia CASA Standards for Local Programs
- Employer's Supplemental Tax Guide, IRS Publication 15-A

Overview

- Risk management overview and goals
- Screening
- Employee vs. Independent Contractor
- Employee vs. Volunteer
- Orientation and Handbooks
- Job Descriptions
- Risk Management and Types of Volunteers
 - Board members
- Supervision
- Federal Volunteer Protection Act and state laws
- Insurance
- Crisis Communication
- Risk Management Hypothetical Situations

What is at risk?

- A risk is any uncertainty about a future event that threatens your organization's ability to accomplish its mission.
- Assets to think about:
 - People
 - Property
 - Income
 - Good Will

Risk Management: prevention & protection

- Risk management is a discipline for dealing with the possibility that some future event will cause harm.
- The goal of risk management is to improve performance by acknowledging and controlling risks.
- It's about protecting and conserving your organization's resources and providing services sensibly.
- It provides strategies, techniques, and an approach to recognizing and confronting any threat faced by an organization in fulfilling its mission.

Screening

- To protect the CASA volunteers, staff, the children we serve, and the reputation of the network, establish a basic screening process that reduces risk.
- All applicants (staff & volunteers) should be subject to a developed, basic screening process based upon potential risk of position:
 - Application review
 - Interview
 - Reference checks (3+)
 - even if the applicant is the board chair's nephew or the mayor's sister
 - Don't ask questions that are leading or too general or ones that can be answered yes/no

Screening

- Background checks (every 5 years) (GET CONSET)
 - Child Abuse Registry
 - Sex Offender Registry
 - (local, state, national)
 - Have established criteria/guidelines for unrelated offenses
- Verification of education/licensure requirements (staff)
- IRS Form I-9 Employment Eligibility Verification (staff)
- Driving Record
 - Motor Vehicle Record
 - Proof of insurance
 - copy of driver's license

Employee vs. Independent Contractor

■ Taxes

- Federal income tax, Social Security, Medicare, unemployment

■ Control and Independence

– 1. Behavioral Control

- Subject to business instructions
 - Does the organization retain the right to control the details of a worker's performance?
- Training the business gives to the worker

Employee vs. Independent Contractor

– 2. Financial Control

- Extent of worker's unreimbursed business expenses
- Extent of worker's investment
- Extent that worker's services are available to relevant market
- How the business pays the worker
- Extent to which worker can realize profit or loss

Employee vs. Independent Contractor

- 3. Type of Relationship
 - Whether the business provides the worker with employee-type benefits (health insurance, pension, vacation, sick leave)
 - Permanency of relationship
 - Extent to which services performed by worker are key aspect of the regular business operations
- IRS Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding
 - Note: If an independent contractor is found to be an employee, you'll be responsible for all back taxes!

Employees vs. Volunteers

- Who is an employee?
 - Provides service in exchange for compensation
 - Other people on staff are paid for the same work
 - Subject to "control" by the organization
- Who is a volunteer?
 - No expectation for compensation
 - Organization does not normally compensate someone for this service
 - No regular employee displaced
 - No promise of future employment
 - Limited control exerted by the organization over the individual

Employee vs. Volunteer

- Beware of creating an employment relationship with volunteers
- **Even if you call a person a volunteer, if he/she legally looks like an employee, you're liable!**
 - Employees who "volunteer" their time outside of work time
 - Training period as a volunteer before they become an employee
 - Individual is promised to be hired in the next job opening that arises, so he volunteers
 - Stipends
 - Non-wage benefits
 - Tickets
 - Expense Reimbursement
 - Meals, lodging, transportation
 - Reimbursement vs. Provision
 - Applicability of Discrimination laws
 - Worker's Compensation

Orientation and Handbooks

- Separate versions for staff and volunteers
- Contents:
 - Mission and history
 - Expectations (services and hours)
 - Operational Guidance
 - Confidentiality
 - Discrimination
 - Prohibited behavior
 - Grievance Procedure
 - Disciplinary Actions/Grounds for Termination
 - Employee or volunteer-at-will
 - For volunteers:
 - Position is w/o compensation
 - Service is at discretion of agency
 - Volunteer may not represent agency
 - Maintenance of volunteer files
 - Whistleblower Policy
- Signatures

Volunteer Job Description

- Give the prospective volunteer a job description at the first meeting to clarify—for the applicant and nonprofit—
 - the nature of the CASA volunteer role
 - the qualifications for the position
 - whom to report to
 - the time commitment
 - the expectations
 - the prohibitions and the consequences
 - establish limitations and barriers that may discourage undesirable individuals from joining the program
 - signatures

Risk Management and Types of Volunteers

- Different volunteer positions → different amounts of risk
 - Board members
 - Direct Service/Programmatic Volunteers
 - Office/clerical help

Board Members

- Are fiscally and legally responsible for your program
- Owe a fiduciary duty of obedience, loyalty, and care
 - Board Manual
 - Board Orientation
 - By-laws
 - Minutes from meetings
 - Informed and regular review of financial statements/budget
 - Regular attendance at board meetings
 - Clear understanding of board's role in personnel situations
 - Conflicts of Interest Policy, Disclosure Statements
 - Maintains up-to-date Personnel Policies, Internal Controls Policy, Crisis Communication Policy
 - Hires auditors and reviews audit

Board Members

- **Questions every board should ask:**
 - Does the board keep thorough and accurate records?
 - Do the meeting minutes document the decisions made including a summary of the major points of discussion?
 - Are dissenting votes recorded?
 - Does the board explore options before arriving at a decision?
 - Are attendance policies in place and enforced for board members who fail to participate?
 - Do members stay informed about the nonprofit's activities?
 - Are background materials provided in advance of each meeting?
 - Do members ask questions and seek clarification on matters before them?
 - Does the board help prepare the budget? How does the board handle deviances?
 - Does the board ensure taxes are being paid?
 - Does the board have a conflict of interest policy? Is it followed?
 - Is the organization filing IRS Form 990, Return of Organization Exempt from Income Tax?

Programmatic Volunteers

- Maintain up-to-date records, reviewed regularly
- Orientation
- Training
- Job Description
- Handbook
- Evaluations

Supervision

- **Educate-** Teach the Volunteer the policies, procedures, and organization culture.
- **Motivate-** Encourage the Volunteer to learn, participate and achieve.
- **Support-** Offer assistance in areas where there is room for improvement.
- **Direct-** Maintain or help determine focus of Volunteer participation.
- **Correct-** Address inappropriate behaviors and actions.

Supervision

- As a supervisor:
 - Be tactful and diplomatic.
 - Be fair.
 - Communicate expectations clearly.
 - Develop written policies and supply volunteers with copies, for expectations on interaction and code of conduct expectations.
 - Be supportive.
 - Document! Document! Document!
 - Act as a resource, listening, giving feedback, giving credit where earned, and corrective action where necessary.
 - Do not play favorites.
 - Conduct regular performance appraisals.
 - Plan volunteer recognition activities.

Supervision

- When dealing with a problem:
 - Address it. Do not allow it to fester.
 - Ensure that you are calm before addressing the situation.
 - Plan the conversation.
 - Always address the problem actions and behaviors, never the person themselves.
 - Address issues in private, preferably with the volunteer and an observer in the room.
 - Give examples of behaviors and relate the results on the organization and its members.
 - Give the volunteer a chance to change problem behaviors.
 - Ensure that the corrective action taken is fitting and consistent with treatment of others.
 - Document!

Documentation

- Statistics
 - Integrity of data
 - Outcome measures
- File Checklists
- Reputation at stake!
 - Catholic Charities example

Discipline

- Myth: you shouldn't fire a volunteer . . . except in instances of severe policy violations or other outrageous conduct.
- Like paid staff, volunteers may be unable or unwilling to fulfill the duties they have been assigned.
- If reassignment isn't possible, or if volunteers violate rules to which they are required to abide, discipline should be imposed.
 - Performance counseling
 - Progressive discipline
 - Termination
- Risks:
 - Future claim they were an employee
 - Discrimination claims
 - Contract claims

Volunteer Protection Act, 1997

- 42 U.S.C. § 14503(a)
- Provides immunity for volunteers serving nonprofits or government for harm caused by their acts or omissions if:
 - The volunteer was acting within the scope of his or her responsibilities at the time of the act/omission.
 - Appropriate or required, the volunteer was properly licensed, certified or authorized to act.
 - The harm wasn't caused by willful, criminal or reckless misconduct, gross negligence or a conscious, flagrant indifference to the rights or safety of the individual harmed.
 - The harm wasn't caused by the volunteer operating a motor vehicle, vessel or aircraft where the state requires an operator's license and insurance.

Volunteer Protection Act, 1997

- Despite the Act, many volunteers remain liable for some actions
- Does not protect nonprofit organizations
- Does not prevent an organization from bringing a legal action against a volunteer
- Does not apply if volunteer receives anything in value in excess of \$500 annually
- Every state in the U.S. has some form of volunteer protection laws.
- The federal Volunteer Protection Act preempts state laws "to the extent that such laws are inconsistent with the Act."
 - However, it doesn't preempt the additional protection from liability for volunteers that states may provide nor does it preempt a number of other conditions.

Georgia Law on Volunteer Immunity

- **§ 51-1-20.** Liability of persons serving charitable organizations and public entities while acting in good faith

(a) A person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, of any nonprofit hospital or association or of any nonprofit, charitable, or eleemosynary institution or organization or of any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.

(b) As used in this Code section, the term "compensation" shall not include reimbursement for reasonable expenses related to said services.

CASA Statute on Immunity

- O.C.G.A. § 15-11-9.1(i)
- Any CASA authorized and acting in good faith, in the absence of fraud or malice, and in accordance with the duties required by this code section, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of taking or failing to take any action pursuant to this code section. This code section shall not be construed as imposing any additional duty on a CASA which is not already imposed by law.

Vicarious Liability

- Respondeat Superior
- Negligent Hiring/Retention
- A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others.
 - Foreseeability: Did the nonprofit know or should it have known that the staff member (volunteer) posed an unreasonable risk of harm?
 - Control: Did the nonprofit have control over the activity in which the "actor" was engaged?
- ***Importance of adequate screening and supervision!!*

Insurance

- Types of claims
 - Claims filed against the nonprofit
 - Claims filed against the volunteer
- No single policy addresses every type of risk
 - Professional liability (D & O)
 - General liability (Premises)
 - Property
 - Accident and Injury
 - Primary Coverage/Worker's Compensation
 - Automobile (if necessary)
- Every nonprofit should identify an insurance professional/agent/broker/consultant who can help evaluate insurance coverage needs and assist with applications

Directors and Officers Insurance

- Broad definition of insured
 - “any natural person who was, is, or becomes a director, trustee, officer, employee, committee member, or volunteer” as well as the nonprofit organization itself
- Requirement to advance defense costs
- Broad coverage for employment practices liability

Protect against employment related lawsuits:

- Keep your employee handbook updated and in compliance with current law
- Clearly and promptly document each employment action
- Make “at will” the standard of employment
- Ban the word “permanent” from your employee handbook
- Follow your employee handbook to the letter!
- Conduct candid, thorough annual reviews
- Make a prompt, thorough investigation of allegations of discrimination or harassment
- Seek legal advice before taking an employment action

Crisis Communication

- Adequate preparation is essential
- Designate a media spokesperson (and at least one back-up) who has been trained in media relations and interviews
- Make sure that everyone knows the identity of the designated spokespersons
- Remember that "no comment" says a lot
- Stay calm and "on message"
- Deliver a positive, truthful message about your organization
- Show concern and compassion

Risk Management Hypos

- **The Embezzling Employee.** You serve as a director and the treasurer of a local CASA program. You are advised that your executive director has embezzled monies that were supposed to have been paid to the IRS as withholding taxes. Now the IRS has asked you to pay them the embezzled monies.
 - Are you liable?

The Embezzling Employee

- Not if you have an audit committee that carefully reviewed the financial statements and obtained outside audits on an annual basis. You are able to show the IRS that the former executive director's scheme was so clever it fooled the audit committee and the outside CPA firm as well. You also obtained bonding for all employees who dealt with funds, including the executive director. The bond amount is large enough to cover any claim of the IRS. It's the bonding company's problem. Even if the bonding is inadequate, there's still the director's and officer's insurance policy. A claim by the IRS falls squarely inside the policy, and the insurance company will have to hire an attorney to represent you against the IRS.
- Yes if you just signed whatever your executive director asked you to sign. Apparently that included large checks drawn to him. You never got around to getting bonding. And the director's and officer's coverage contains an obscure exclusion for claims arising out of a breach of criminal law. It turns out it's a crime to fail to take appropriate steps to prevent the loss of withholding monies. The IRS debt isn't even dischargeable in bankruptcy.

Risk Management Hypos

- **Sexual Misconduct.** One of your CASA volunteers has been arrested and charged with child sexual abuse. Now the parents are threatening to sue you and the organization. Are you liable?

Sexual Misconduct

- Not if your organization instituted a program of reasonable screening for volunteers, which included a requirement that they complete a form providing information about their background and experience and background checks, your board members are not likely to be personally liable for negligently selecting the CASA, who lied on his application. However, your organization may still be exposed to vicarious liability for the volunteer's sexual misconduct.
- Plus, your program had an ongoing system for review and evaluation of volunteers, including evaluations from people who had worked with the CASA, so rumors of the man's potential for misconduct reached you before real harm could be done. And, concerned individuals had a means of advising you of their concerns.
- Finally, since you knew there was a risk, you ensured your liability insurance included coverage for this kind of risk. You purchased an endorsement to the standard general liability policy for this specific kind of claim, including the cost of defense. You also maintain a reserve in your budget for the amount of the deductible.
- Yes if you never dreamed it could happen in your organization. Because it is so difficult to find volunteers, you accept everyone without asking questions. Because you took no preventative measures and because people are saying that unmistakable signs of the volunteer's misconduct were overlooked or ignored, your board members are exposed to personal liability for gross negligence. Worse, the organization's liability insurance explicitly exclude coverage for that kind of claim.

Risk Management Hypos

- **The Fundraiser:** One of your largest funding sources comes from your signature event that you hold each year. The fundraiser is staffed by both your employees and volunteers, who man booths and provide support to the staff
 - Someone walks into your office and wishes to sign up to volunteer at your fundraiser.
 - In order to thank your volunteers, you wish to distribute to each a commemorative t-shirt.
 - One of your staff wishes to forgo their pay for the fundraiser event.
 - You are short on volunteers for the fundraiser. You offer each person who volunteers a gift card for \$50 to the local mall.

Questions?

Thank you for your time and
attention!